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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

CHARLES E. AUSTIN, INC.,
a Michigan corporation,
Petitioner and Appellant Below,

vs.

HARRY F. KELLY, Secretary of State,
Defendant and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles E. Austin, Inc., a Michigan corporation, hereby respectfully prays for a writ of certiorari addressed to the Supreme Court of the State of Michigan directing it to certify to this Honorable Court for review and determination the record in a certain cause, No. 43,918, entitled "Charles E. Austin, Inc., vs. Harry F. Kelly, Secretary of State". The transcript of the record in the case, including the proceedings in the Supreme Court of the State of Michigan, is furnished herewith in accordance with the Rules of this Court.

By its decision rendered on June 14, 1948, the Supreme Court of the State of Michigan held that under the Gasoline Taxation Statute of the State of Michigan, a gasoline tax could be assessed against the petitioner on the quantity of gasoline stored in tanks by Joy Oil Company, Ltd., a Canadian corporation, in the City of Dearborn, Michi-

gan, pending transshipment to Canada upon the same premises from which the petitioner operated a wholesale gasoline distributing business. (The decision of the Supreme Court of Michigan is not yet reported).

JURISDICTION

The grounds of jurisdiction are:

(1) The date of the judgment to be reviewed is June 14, 1948. The Supreme Court of the State of Michigan is the highest court of law or equity in said State of Michigan; that the judgment appealed from is a final judgment and presents a Federal question in this case. This application is made within the time limit prescribed by the Rules of this Court.

(2) The statute under which the jurisdiction is invoked is Section 237, Judicial Code (28 U. S. C. A., Sec. 344(a), 861(a), 8 FCA, Title 28, Sec. 344(a).

(3) The Supreme Court of the State of Michigan decided a Federal question of substance as to the right of the State of Michigan to assess a tax under the Gasoline Tax Law of Michigan on gasoline, a commodity in foreign commerce, in favor of respondent herein by holding that the interruption of the journey in foreign commerce by the storing of gasoline in tanks in the City of Dearborn at the end of the rail journey pending transshipment by boat to Canada rendered the commodity subject to such tax, which decision is not in accord with the Import-Export Clause in the United States Constitution and probably not in accord with applicable decisions of this Court, including the cases of:

Carson Petroleum Company vs. Vial, 279 U. S. 95, 73 L. Ed. 626;

Richfield Oil Corporation vs. State Board of Equalization, 329 U. S. 69, 91 L. Ed. 80;

A. G. Spaulding & Bros. vs. William H. Edwards, Collector of Internal Revenue, 262 U. S. 67, 67 L. Ed. 865.

GROUNDS FOR APPLICATION

The petitioner prays that a writ of certiorari issue to the Supreme Court of Michigan on the following grounds:

First. The assessing and levying of a gasoline tax against the merchandise gasoline, a commodity in foreign commerce, was repugnant to the following provisions of the Constitution of the United States, Article I, Sections 8, 9 and 10, the pertinent provisions reading as follows:

> "Section 8, sub-paragraph (3)
>
> "The Congress shall have the power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."
>
> "Section 9, sub-paragraph (5)
>
> "No tax or duty shall be laid on articles exported from any state."
>
> "Section 10, sub-paragraph (2)
>
> "No state shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of Congress."

Second. The Supreme Court of the State of Michigan decided a Federal question in a way probably in conflict with applicable decisions of this Court.

BRIEF STATEMENT OF FACTS

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

Margaret P. Austin, as Trustee for her children, owned a bulk storage plant consisting of four separate storage plants designated as Tank No. 1, 4,200,000 gallons capacity,

Tank No. 2, Tank No. 3 and Tank No. 4, each having a capacity of 420,000 gallons (57, 82, 96, 196, 299). Tanks No. 1 and 3 were leased to petitioner, Charles E. Austin, Inc. (309). Tanks No. 2 and 4 were leased to Joy Oil Company, Ltd., a Canadian corporation, during the navigation season on the Great Lakes and used by that company for the storage of gasoline pending transshipment to Canada but not for distribution in the United States (Exhibit 8-196). These tanks were leased to Charles E. Austin, Inc. during the balance of the year.

Joy Oil Company, Ltd. is a corporation organized under the Canadian laws operating in Canada only. It was organized in 1934. Margaret P. Austin was President and Secretary of the company and also owned all of its shares of stock as Trustee, except a few qualifying shares (298-299). It carries on no operations within the State of Michigan, except the storing of gasoline in Tanks No. 2 and 4 and possibly on one occasion Tank No. 3. Gasoline purchased in the states of Oklahoma and Pennsylvania in the United States was stored in the aforesaid tanks pending transshipment by boat to Canada (299, 302). It is engaged in the gasoline and oil distribution business in the Provinces of Ontario and Quebec, Canada (58). In emptying the tanks of 420,000 gallon capacity there would remain in the bottom of the tank below the sump-pump line, which is 18 inches from the bottom, from 4,000 to 12,000 gallons of gasoline which is known as "tank bottoms" (64, 156). This fact is important in that the claim is made that there was a commingling of gasoline purchased for export for Joy Oil Company, Ltd. stored in tanks in which petitioner, Charles E. Austin, Inc., had gasoline — to the extent that gasoline owned by petitioner as "tank bottoms" there was a commingling.

From the Dearborn plant Joy Oil Company, Ltd. shipped gasoline by boat to Canada during the navigation season (163). The gasoline was invoiced by the supplier as follows:

> "Sold to Joy Oil Company, Ltd., care of Chas. E. Austin, Inc., Detroit, Michigan"

and marked for export. The railroad bills of lading for such gasoline were in like form, except they contained the words "For export" (58, 162, 210). The Joy Oil Company, Ltd. furnished affidavits to the United States Government that the petitioner's gasoline in question would be exported to Canada in compliance with the requirements of the Federal Manufacturers Excise Tax Act (306) and to the carriers in compliance with the Federal Transportation Act. Shippers Export Declaration was issued to the United States Customs Service showing shipment of the gasoline to Canada (306). During the months of September, October, November and December, 1939, orders totaling 1,621,291 gallons were given by Joy Oil Company, Ltd. to Hurley Gasoline Sales Company and Natural Gasoline Products Company, all of which was shipped by railroad tank car to Dearborn, Michigan, and stored in the leased tanks (58). In the months of April, May, June, July, August, September and October, 1940, it purchased from the same suppliers 1,131,999 gallons of gasoline which was shipped to Detroit by rail and stored in leased tanks at Dearborn. All of this gasoline, with one exception, was later transshiped to Canada. The purchases, storage and transshipment was not peculiar to these months but had been the regular course of business during the navigation season in previous years (153). The one exception of transshipment to Canada was the purchases in the months of September, October and November of 1939 of a quantity of gasoline sufficient for two boat loads. The Joy Oil Company, Ltd. had chartered two boats to transship the gasoline to Canada. The first boat arrived and transshipment was made. The last boat was supposed to arrive at Dearborn, Michigan, in October, 1939, but by December 1939 the boat had not arrived. That is the end of the navigation season on the Great Lakes (170). There was on hand in the storage tanks 843,403 gallons of gasoline owned by the Joy Oil Company, Ltd. (50). Charles E. Austin, Inc. under its lease wished to use the storage tanks (170). On December 6, 1939, it took an assignment of that quantity of gasoline. However, although 843,403 gallons had been put in storage, there had been an evaporation during September, October and November of 32,254 gallons so that Charles E. Austin,

Inc. actually received and paid for 811,149 gallons and as of that date paid the state gasoline tax (59). This exception is due purely to the exigencies of the situation.

Mention is made in the opinion of the Michigan Supreme Court that Charles E. Austin, Inc. paid the suppliers of Joy Oil Company, Ltd. for gasoline purchased. For a period of time after September 5, 1939, the Foreign Exchange Control Board of Canada would not permit the payment of money out of Canada in United States dollars until such time as the goods were landed in Canada. The shares of stock of Charles E. Austin, Inc., a Michigan corporation organized in 1937, were also owned by Margaret P. Austin, as Trustee, and because of the close relationship by virtue of common stock ownership, it was not unusual that Charles E. Austin, Inc. made the payments on behalf of the Joy Oil Company, Ltd. to the suppliers so that the gasoline might be shipped to Dearborn for storage pending transshipment. After the gasoline reached Canada it was reimbursed in United States dollars for such payment. This possibly lasted for a period of several months (61, 157). After that the Foreign Exchange Control Board of Canada made payment direct to the supplier in the United States (151, 157). On some occasions the Joy Oil Company, Ltd. would not have sufficient gasoline in storage to make a complete boat load. On such occasions it would purchase sufficient gasoline from Charles E. Austin, Inc. to fill the boat (64, 65). When the Joy Oil Company, Ltd. put gasoline into an entirely empty tank at the end of the navigation season, Charles E. Austin, Inc. would purchase the "tank bottoms" (64, 65). Aside from that Charles E. Austin, Inc. sold to Joy Oil Company, Ltd. and transported by tank truck to Windsor, Canada large quantities of gasoline (199, 308, 383). This gasoline is not involved in the present situation except as it may explain some commingling of Charles E. Austin, Inc. gasoline in Tank No. 4 in the months of April, May and June, 1940 (155).

On assessing the Michigan gasoline tax against Charles E. Austin, Inc. upon Joy Oil Company, Ltd. gasoline stored during the audit period in the leased tanks, the auditor did not make such an assessment on the theory of

commingling of gasoline. Evidently he recognized there was no commingling whatever in Tank No. 2 and an immaterial amount in Tank No. 4 during the three months mentioned. Rather his theory appears in the following testimony:

> "Q. Now, Mr. Leffler, on what basis did you determine that the items which the plaintiff claims are purchases for the Joy Oil Company are in fact taxable to Chas. E. Austin, Inc.? * * *
>
> A. All of these purchases were received into the State of Michigan in tank cars and were unloaded into the storage facilities normally used by Chas. E. Austin, Inc. in the conduct of his wholesale gasoline business.
>
> THE COURT: And you maintain under such circumstances under the law its taxable in that particular month?
>
> A. That's right."

The tax was assessed on the theory that any gasoline, regardless of the fact that it was in the course of exportation to a foreign country whenever it was received in the state of Michigan is taxable.

The auditor did not recognize the separate corporate entities but treated the gasoline stored by Joy Oil Company, Ltd. as unreported gasoline of Charles E. Austin, Inc. and computed the tax deficiency upon that basis. From the 1,975,402 gallons of gasoline stored in the tanks pending transshipment by boat to Canada, there was an evaporation of 106,319 gallons. The auditor deducted the tax on the actual number of gallons transported by boat to Canada but since there was no allowance for evaporation (262) on the gasoline transported to Canada, a tax was assessed in an amount of $3,093.82 upon Joy Oil Company, Ltd., together with a penalty of $3,592.32, plus interest at the rate of 1% per month on the aggregate of the tax and the penalty. It is the decision of the Supreme Court of Michigan affirming the assessment of such a tax and penalties which petitioner seeks to have reviewed.

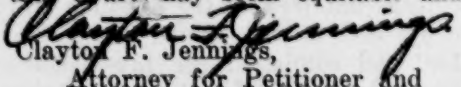
REASONS RELIED UPON FOR THE GRANTING OF A WRIT OF CERTIORARI

The discretionary powers of this Court are invoked upon the following grounds, being those included among the grounds enumerated in Rule 38 of the Rules of this Court:

First. The Supreme Court of Michigan decided the case in a manner repugnant to Article I, Section 10, of the United States Constitution.

Second. The Supreme Court of Michigan decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that this Court grant a Writ of Certiorari under Judicial Code, Section 237, as amended, to be issued out of and under the seal of the Court, directed to the Supreme Court of the State of Michigan, to remove therefrom for review here the record in the cause therein pending, No. 43,918, wherein your petitioner is appellant, and the respondent appellee, that the opinion and judgment of the Supreme Court of Michigan may be reviewed by this Court, and that the petitioner have such other and further relief in the premises as to this Court may seem equitable and just.



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Dated: July 15, 1948.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Record references)

The case as submitted to the Michigan Supreme Court presented several issues that are not involved in this petition, since as to them no review is sought. The transcript of the record filed pursuant to Rule No. 38(7) contains much material that is not pertinent to this appeal because of that fact. The pages of the record that are pertinent are: 9 to 29 (Bill of Complaint and Answer); 43, 44 (Reasons and Grounds for Appeal); 45-69 (Stipulated Facts); 150-172, 196-204, 303-309, (Testimony of Charles E. Austin); 212-268, 290-297, 313-314 (Testimony of Covert E. Leffler, Auditor); 297-302, 309-312 (Testimony of Margaret P. Austin); and 380-382 (Exhibit 1 — Assessment of Gasoline tax and Demand for payment). If a writ of certiorari is issued as prayed for, a reduced transcript in proper form will be filed.

ARGUMENT

The Export-Import Clause of the Constitution of the United States clearly prohibits a state from levying any tax on commodities exported, except such as may be necessary for executing the state inspection laws. This being a tax on gasoline under the gasoline tax statute of the State of Michigan, the exception is not involved. The pertinent parts of the Michigan Gasoline Tax Statute are as follows: (Act 150, Public Acts of 1927, as amended by Act 160, Public Acts of 1931). The title reads: "Gasoline Tax Law".

> "Sec. 2. A tax of three cents per gallon is hereby imposed on all gasoline sold or used in producing or generating power for propelling motor vehicles used upon the public roads and highways in this state, which tax shall be paid at the times, in the manner and by the persons hereinafter specified. It is the intent of this act to impose a tax upon the owners and drivers of motor vehicles using a combustible

type of engine upon the public roads and highways of this state by requiring them to pay for the privilege thereof, in addition to the motor vehicle license tax, at the rate of three cents per gallon for all motor vehicle fuel so used.

"Sec. 8. For the purpose of determining the amount of the specific tax herein imposed, every wholesale distributor shall, on or before the twentieth day of each month, file with the secretary of state, on forms prescribed and furnished by him, an itemized statement, under oath, showing the number of gallons of gasoline which has been or is in his or its possession in the state of Michigan on the date this act became effective upon which the tax has not been paid, and all gasoline thereafter received, as shown by the shipper's invoices thereof, by such wholesale distributor in the said state of Michigan from any source whatsoever, during the preceding calendar month; the date of said purchase; the name of the manufacturer or person, persons, firm, association or corporation from whom purchased; the date of receipt of such shipment of gasoline; the point of origin; the point of destination of each shipment; the quantity of each of said purchases or shipments; the name of the carrier; the number of the car in which the same was shipped, if shipped by rail, or the name and owner of the boat, ship, barge or vessel, if shipped by water; the owner and license number of the automobile or motor truck used in transporting such gasoline within this state, when such gasoline was purchased from the manufacturer; the name and address of the owner of the wagon, or other means of transportation, if brought into this state by such mode; and in case gasoline is not so received and such wholesale distributor manufactures or produces within this state the gasoline in his or its possession in said state, the report hereby required shall in lieu of the foregoing information set forth the following: All gasoline manufactured, stored, used, distributed, and sold within this state during the preceding calendar month,

and date of each sale, use or distribution; the quantity of each sale; the name and address of each purchaser; the name of the carrier, the number of the car in which the same was shipped, if shipped by rail; or the name and owner of the boat, ship, barge or vessel, if shipped by water; the owner and license number of the automobile or motor truck used in transporting such gasoline; the name and address of the owner of the wagon or other means of transportation employed in the delivery of such gasoline so sold or distributed within this state, and such other information pertaining to such receipts, manufacture, use, distribution and/or sales of gasoline as the secretary of state may require. It shall be the duty of each wholesale distributor, at the time of filing such report, to compute the amount of tax payable on account thereof at the rate of 3 cents per gallon, and to pay to the secretary of state at the time of filing such report the full amount of such tax: Provided, however, That in computing said tax, a deduction of 3 per cent of the quantity of gasoline received shall be deducted to allow for evaporation and loss: And provided further, however, That in computing said tax all gasoline while in process of transfer from tank steamers at boat terminal transfers, as defined in this act, and while held in storage, pending wholesale bulk distribution by land transportation, or in tanks and equipment used in receiving and storing gasoline from interstate pipe lines pending wholesale bulk reshipment, shall be exempt from the payment of said tax. Gasoline refined at a refinery in this state or gasoline stored at a boat terminal transfer in this state may be sold, shipped or delivered to wholesale distributors who are holders of unrevoked wholesale distributors' licenses issued by the secretary of state as in this act provided, without liability on the part of the seller for the tax herein imposed but such purchasers shall be liable for the tax on such gasoline and shall for the purposes of this act be deemed to be the wholesale distributors of the gasoline so received. No wholesale distributor or retail dealer or any other person selling gasoline to the

consumer shall receive and have delivered into the storage tanks or other equipment of said wholesale distributor or retail dealer or any other person any gasoline between the hours of 9 o'clock p. m. and 5 o'clock a. m. without prior written consent of the secretary of state, and the receipt of any gasoline by said wholesale distributor or retail dealer or any other person during said hours shall be prima facie evidence of a violation of the provisions of this act.

"Sec. 12. The purchaser of gasoline used for any purpose other than the operation of motor vehicles on the public roads, streets and highways in this state, and municipalities and the federal government using gasoline in municipally and federally owned motor vehicles, respectively, shall be entitled to a refund of the tax paid thereon, upon filing a sworn claim with the secretary of state upon forms prescribed and to be furnished by him, within 6 months from the date of purchase, as shown by the invoice. It shall be the duty of the retail dealer to furnish any such purchaser with an invoice, showing the amount of gasoline purchased, the date thereof, and the amount of tax paid thereon, and every such dealer shall at the request of the secretary of state forthwith supply the secretary of state with a copy of any invoice issued by said dealer during any 6 months' period preceding such request. All claims for refund shall have attached thereto the original invoice received by the purchaser and when approved by the secretary of state, shall be paid out of the state highway fund upon the warrant of the auditor general. No claims for refund shall be assignable without the prior written consent of the secretary of state.

"Sec. 20. Neither this act, nor any of its provisions, shall apply to foreign or interstate commerce."

Under the foregoing statute the wholesale distributor is merely a tax collector of a tax to be eventually paid by the operator of motor vehicles upon the highways in the state of Michigan.

The Supreme Court of Michigan in its decision held that the case of *Joy Oil Company, Ltd., vs. State Tax Commission* (not yet reported) decided by it on May 18, 1948, was conclusive of the question in the case at bar. There is now pending before this Court an application for writ of certiorari in that case. It was a case in which the City of Dearborn, Michigan, levied an ad valorem tax upon gasoline owned by the Joy Oil Company, Ltd. and stored at Dearborn, Michigan, pending transshipment to Canada. Due to inability to procure boats to promptly transport the gasoline, there was a delay in excess of fifteen months. The Supreme Court of Michigan held that when the gasoline was unloaded from railroad tank cars into storage tanks pending the transshipment there was such an interruption of the journey that it could not be held to be continuous and that, therefore, the gasoline was subject to an ad valorem tax. In the present case the Supreme Court of Michigan likewise held that there was a break in the continuity of the gasoline in interstate and foreign commerce and, therefore, is subject to the gasoline tax.

The decision of the Michigan Supreme Court is squarely in conflict with the case of *Carson Petroleum Co. vs. Vial,* 279 U. S. 96, 73 L. Ed. 626, the case upon which we principally relied before the Supreme Court of Michigan, although that case is not mentioned in its opinion. It does mention the cases of *Spalding & Bros. vs. Edwards,* 262 U. S. 66, 67 L. Ed. 865, and *Richfield Oil Corp. vs. State Board of Equalization,* 329 U. S. 69, 91 L. Ed. 123. As to the latter cases, there is some dissimilarity on the facts but not on principle. *The Carson Petroleum Co.* case is practically identical on the facts and the principle of that case is controlling here.

In the case of *Carson Petroleum Company vs. Vial, supra,* the opinion was delivered by Mr. Chief Justice Taft. The facts involved a situation where the Carson Petroleum, a corporation of Deleware, purchased oil from out of the state and by a system of tanks and pumps stored the oil in the State of Louisiana. The tanks and equipment were at St. Rose, a few miles above New Orleans. The only business conducted there by that company was the unloading of oil from railroad tank cars into storage tanks and

the loading of the oil from the storage tanks aboard the tankers for shipment to England, France and other ports. The oil was bought by the Carson Petroleum Company from refiners in the Mid-Continent Field, comprising Kansas, Oklahoma and Texas, and was shipped to St. Rose, Louisiana, in railroad tank cars consigned to the Carson Petroleum Company. The shipments were not on through bills of lading, but on an export rate, which is lower than the domestic rate. The Carson Petroleum Company takes orders for cargoes of oil from the foreign buyers who charter the ships to transport the oil from St. Rose to the foreign ports. The State of Louisiana attempted to impose a tax upon the oil while stored in Louisiana pending transshipment to England. The defendant's contention in that case was that they were two separate shipments, one which ended when the tank cars arrived and were unloaded at St. Rose and the foreign shipment which began when the oil was loaded abroad ship for the foreign port. This Court held that the gasoline was a commodity in foreign commerce in spite of the interruption of the journey and was not subject to taxation by the State of Louisiana. That case lends itself to paraphrasing as to the case at bar. If anything, the case at bar is stronger in that the Joy Oil Company, Ltd., a Canadian corporation, itself purchased the gasoline from several states in the United States, transported it to Dearborn to store in tanks until a sufficient supply was accumulated for a boatload to Canada, and all the gasoline upon which the tax was levied was actually transported to Canada.

In the Carson Petroleum Company case there are cited many other cases which in principle apply to the situation before us in the case at bar. Among those are *Champlain Realty Co. vs. Brattleboro,* 260 U. S. 366; *Railroad Commission vs. Worthington,* 225 U. S. 101; *Southern P. Terminal Co. vs. Interstate Commerce Commission,* 219 U. S. 498; and *Texas & N. O. R. Co. vs. Sabine Tram Co.,* 227 U. S. 111.

The *A. G. Spaulding & Bros.* case involved a Federal tax on baseball bats and balls sold by the manufacturer. A firm in a foreign country ordered a Commission House in New York to buy a quantity of bats and balls. The New

York Commission House placed the order with the manufacturer, instructing it to deliver the packages to an exporting carrier in New York for shipment overseas. The goods were delivered to the carrier and an export bill of lading was issued. In due course the goods were shipped overseas. The issue in that case was whether the sale was a step in exportation. In the course of the opinion written by Mr. Justice Holmes it was held that the merchandise was not subject to the tax because it was a commodity in foreign commerce and subject to the prohibition against taxation contained in the Export-Import Clause of the United States Constitution.

In the *Richfield Oil Corp. case,* the State of California assessed a sales tax upon gross transactions against gasoline while it was in storage pending transshipment to New Zealand. The California Supreme Court sustained the tax against the claim that it was repugnant to Article I, Section 10, Clause 2, of the Constitution of the United States. This Court reversed the opinion of the Supreme Court of California in a very exhaustive and informative opinion written by Mr. Justice Douglas. In the course of the opinion it was said:

> "The requirement that foreign commerce be involved * * * is met, for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem. There are a few decisions of the Court under Article I, Section 10, Clause 2, which illuminate the problem."

The Court then reviewed many cases involving or touching upon the questions, among them being the *A. G. Spaulding Bros.* case. In conclusion Mr. Justice Douglas said:

> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. * * *.

> "We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional."

It seems entirely clear that the decision of the Supreme Court of Michigan in the case at bar was in direct conflict with the three cases cited above upon which we relied; that this renders the case subject to review by this Court.

Before closing this argument, it seems necessary to us to refute some of the statements made in the decision of the Supreme Court of Michigan. The Court stated that the plaintiff conceded that to some extent there was a commingling of its gasoline with that of Joy Oil Company, Ltd. In the statement of facts we have pointed out the extent of commingling which constituted in the main of "tank bottoms" which is gasoline below the sump line and which contains all the settlings of the entire tank. To the extent that there was commingling the maxim of "de minimis non curat lex" applies. In other words, the commingling of Joy Oil Company, Ltd. gasoline with Charles E. Austin, Inc. gasoline was so negligible as not to affect its basic nature as a commodity in foreign commerce. There was nothing in the record to support the statement of the Michigan Supreme Court that the bills of lading appeared to be designed only to further tax avoidance.

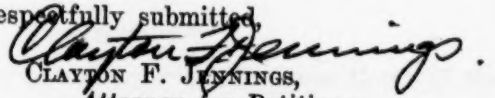
When we consider that all the gasoline in question was actually transported into Canada and also the fact that there was involved 1,975,402 gallons of gasoline with only a tax deficiency of $3,093.92 assessed, which is a tax on something less than 60,000 gallons, there is no basis for stating the bills of lading were marked for export in order to escape a tax, nor is there any basis in the record for the finding of the Supreme Court of Michigan that the two corporations, Joy Oil Company, Ltd. and Charles E. Austin, Inc., by virtue of common stock ownership, could be ignored and gasoline owned and transported in foreign commerce by Joy Oil Company, Ltd. was taxable against the Michigan corporation, Charles E. Austin, Inc. Such

a holding is contrary to the decisions of *Pittsburgh & Buffalo Co. vs. Donovan,* 232 Fed. 584, and *Owl Fumigating Corp. vs. Calif. Cyanide Co. Inc.,* 30 Fed. (2d) 812.

CONCLUSION

We believe that in the foregoing brief we have raised a substantial Federal question which entitles this case to review by this Court. We believe that the decision of the Supreme Court of Michigan is in conflict with decisions of this Court, particularly *Carson Petroleum Co. vs. Vial,* supra, *A. G. Spaulding & Bros. vs. Edwards,* supra, and *Richfield Oil Corp. vs. State Board of Equalization,* supra, which, under the Federal Judicial Code and the Rules of this Court, is sufficient ground for review.

Respectfully submitted,



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Charles E. Austin, Inc.

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CHARLES ELMORE CROPL
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In the

Supreme Court of the United States

October Term, 1948

No. 224

CHARLES E. AUSTIN, INC., Petitioner,

v.

HARRY F. KELLY, Secretary of State of the State of Michigan.

On application for certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

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FRANKLIN DEKLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN

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Brief opposing Petition for Certiorari

I.

Opinion of the Court Below.

Opinion of the court below (436) is officially reported as Chas. E. Austin, Inc. vs Harry F. Kelly, Secretary of State, 321 Mich. 426.

The companion case, involving practically the same questions, October Term, 1948, No. 223, is reported as Joy Oil Company v. State Tax Commission, 321 Mich. 335.

II.

Counter-Statement on Jurisdiction

Petitioner invokes the jurisdiction of this Court under Sec. 237 of the Judicial Code, as amended, (Title 28 U.S. C.A. Sec. 344(a), 8 F.C.A., Title 28, Sec. 344(a)); and he claims that the judgment appealed is a final judgment; that its application is made within the time limit prescribed by the rules of this court and presents a Federal question in this case in that it assesses a tax under the gasoline tax law of Michigan on gasoline, a commodity in foreign commerce, by holding that the interruption of the journey in foreign commerce by storing of the gasoline in tanks at Dearborn, Michigan, at the end of the rail journey pending transshipment by boat to Canada, rendered the commodity subject to tax under the Michigan Gasoline Tax Act, and therefore contravenes the Constitution of the United States and is probably not in accord with applicable decisions of this court.

It is the position of Respondent:

(1) That the Michigan Supreme Court did not decide a federal question of substance:

(a) When the gasoline was received in the State of Michigan, it was received under such conditions that the petitioner itself did not know which, or how much of each shipment would be exported; the election to export or retain the gasoline in Michigan being made from four to six months after the gasoline had arrived at Dearborn, Michigan, and petitioner had been afforded sufficient time to determine from its sales in each country what part of the total shipments (cov-

ered by Bills of Lading which consigned the gasoline to Dearborn, Michigan, but which bills of lading bore the legend "for export") would be needed by petitioner's Canadian bulk plant and Canadian retail stations, and what part would be needed for its Michigan bulk plant and retail stations, which stood in the name of Margaret P. Austin individually, all of which were operated as a unit under identical ownership, though bearing different corporate names.

(b) That the petitioner did not ship the gasoline with the good faith intention of exporting it, but attempted to use the protection of the commerce clause of the United States Constitution to cloak its scheme of state tax evasion;

(c) That the gasoline did not become a commodity in foreign commerce until it was taken from petitioner's bulk plant at the place of consignment, (Dearborn, Michigan), where it was stored in a common storage, from which were supplied both Canadian bulk plant and retail stations, and Michigan retail stations; and that immediately upon removal from the Dearborn bulk plant and placement into a boat or vehicle bound for a foreign port or location, the petitioner received a refund or a credit for the full amount of the tax collected from or debited against the petitioner;

(d) That the question set forth in the application of the petitioner, (it having admitted that it has been repaid or credited with the full amount of tax per gallon levied by the Michigan Gasoline Tax Act, [3c], for each and every gallon of gasoline which it could show it had actually loaded into a boat or vehicle bound for a foreign port or location from a common storage

tank) is a question only of whether or not it has accounted to the State for all of the gasoline received into storage facilities at its Dearborn plant, as is required by Sec. 8 of Act No. 150 of the Public Acts of 1937, as amended. This being a question of fact, the decision is exclusively within the province of the Michigan Supreme Court.

(2) That if a Federal question could be said to have been involved, such question was decided fully in accord with, among other applicable U.S. Supreme Court cases,

Carson Petroleum Company vs. Vial, 279 U. S. 95, 73 L. Ed. 626;

Richfield Oil Corporation vs. State Board of Equalization, 329 U.S. 69, 91 L. Ed. 80;

A. G. Spaulding & Bros. vs. William H. Edwards, Collector of Internal Revenue, 262 U. S. 67, 67 L. Ed. 865,

in that the facts in the last cited, as well as other like cases, all show that there was no probability that any of the goods stored would be diverted to domestic trade channels, and that the storage at the point of transshipment was not for the convenience and benefit of the shippers, and that the point of transshipment and equipment at that point were solely for the speedy and continuous export of the products abroad, and for no other purpose.

And in the recent case of *Empresa Siderurgica, S. A. et al., v. Merced County et al.,* (June 15, 1948) 194 P. (2d) 527, the Supreme Court of California expertly distinguishes the decisions of this Court dealing with the export clause of the Federal Constitution. Syllabus 3 of the decision in a nutshell states the rule. It is there said:

"The determining factor as to whether goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction and to taxation in the usual way is not the owner's intention to export, but whether or not exportation has commenced."

In the instant case the facts clearly show that petitioner's entire arrangement was one of commingling an amount of gasoline previously purchased in quantity estimated to be in excess of export requirements, and designated, on transit documents, as "for export" with a quantity of gasoline admittedly purchased for domestic trade, and later, when the exact export requirements were determinable, filling these export requirements from the commingling stock and selling the balance to the domestic trade, and meanwhile using the claimed export stock as a "pool" from which the petitioner could recover his actual evaporation and handling losses in the admittedly tax paid domestic stock, thereby evading a portion of the State Gasoline Tax. In short, using one composite stock in trade at Dearborn, Michigan, for the supply of the retail trade of the Joy Oil Company, Ltd., in Toronto and Windsor, Canada, areas—Chas. E. Austin, Inc., in the Detroit area—retail stations of Margaret P. Austin in the Detroit area—at such times and in such amounts as the various retail trade areas would absorb it.

III.

Counter-Statement of Facts

Since the function of this court *"is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights,"* * * *"nor does this*

court sit to review the findings of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court," *(Waters-Pierce Oil Co. vs. State of Texas,* 212 U. S. 86, at page 97), we cannot accept the "Brief Statement of Facts" as set forth in Plaintiff's Petition for Writ of Certiorari. Respondent, therefore, sets forth the following statement of the case, based upon findings of fact of the Michigan Supreme Court, in *C. E. Austin Inc., vs. Secretary of State,* 321 Mich. 426, and "further detailed facts" set forth in *Joy Oil Co., Ltd., vs. State Tax Comm.,* 321 Mich. 335, and incorporated in *Austin vs. Secretary of State* (supra) by reference, (see page 431 *Austin vs. Secretary of State,* (supra).)

The facts, so far as material to the issues before this Court, and as found by the Court below:

The petitioner, Chas E. Austin, Inc., conducted the business of a licensed wholesale distributor of gasoline at Dearborn, Michigan. (437)

The Joy Oil Company, Ltd., is a corporation organized under Canadian law; has a bulk plant and retail stations in Canada (302) and is not authorized to do business in Michigan. (438)

Margaret P. Austin individually owns a number of retail gasoline filling stations in Detroit, which obtain their gasoline supplies from Chas. E. Austin, Inc. (442)

Margaret P. Austin, the wife of Chas. E. Austin, so far as the record shows owns all of the foregoing properties. (437) (438) (442)

This combine maintains involved interlocking corporate and individual and intercorporate leasing arrangements and channels of supply conceived and carried on for the purpose of evading payment of taxes. (442) Gasoline was purchased in the name of the Joy Oil Company, Ltd., in Michigan and outside of Michigan (438) and consigned to Joy Oil Company, Detroit, Michigan, c/o Chas. E. Austin, Inc. (58) (441). On arrival at Dearborn, Michigan, the gasoline supposedly destined for Canada was not only commingled with gasoline to be sold to the retail trade in Michigan, but a large amount of the exportable gasoline was itself diverted to the retail use in Michigan. (441) The gasoline received at the tanks in the Chas. E. Austin plant was commingled as suited the convenience of Margaret P. Austin, the Joy Oil Company, Ltd., and Chas. E. Austin, Inc. (439) (440)

Except that it was for the convenience and benefit of the petitioner to commingle the gasoline for transshipment with tax-liable gasoline, the tax-exempt gasoline would doubtless have been stored separately, and thus have avoided the confusion brought about by the manner in which the gasoline storage was handled. (440) All of the gasoline which was withdrawn from the commingled stocks of gasoline and transshipped to Canada was considered tax exempt by the Defendant, Secretary of State, and so far as was reasonably possible, refunds of the tax previously paid were made. (440)

The Respondent, Secretary of State, made an audit of petitioner's records for the period of September 1, 1939 to October 31, 1940 (437) and deeming the gasoline purportedly destined for Canada not to have been in interstate or foreign commerce under the conditions previously set out, assessed the tax provided by the Gasoline Tax Act as of the date of receipt, and credited the petitioner with the tax on

the date of shipment, when petitioner disclosed by his report that he had shipped the gasoline to Canada. (440)

Petitioner filed reports and paid the tax shown to be due by its reports. (437) The tax in issue here is the difference in taxable gallons between the report of the petitioner and the determination of the State Auditor. (Ex. 37A) (385) Exhibit 37A, shown on page 385 of the record, shows a difference in taxable gallons of 197,815, but does not segregate the incidents of difference into differences involved in petitioner's petition to this court and those not so involved. The auditor's testimony (222 to 240) details these differences.

Two undisputed facts stand out in this case: FIRST, that each gallon of gasoline here in question was taxed in the amount prescribed by the statute upon its receipt into petitioner's storage tanks, from which it also supplied Detroit retail filling stations. (222 to 240) (442) SECOND, as set out in the opinion of the lower court (440) the tax on every gallon actually transshipped to Canada was refunded so far as "reasonably possible". (440)

The amount here in question is of course that part of the total number of gallons of gasoline received as purported property of the Joy Oil Company, Ltd., which was not accounted for by showing it to have been exported or still in the possession of the petitioner. (295)

IV.

ARGUMENT.

Had petitioner not confused the gasoline here in question with its domestic stocks, and had the petitioner transshipped it to Canada under circumstances showing *that no portion of it was used or consumed in the United States (Richfield Oil Co. vs. State Board of Equalization,* 329 U.S. 69, at page 71,) *and that the facilities at the waterside were constructed for the purpose of export operations and the only business conducted there was the unloading of oil from the railroad tank cars into storage tanks and loading the oil from the storage tanks aboard the tankers for shipment abroad, (Carson Petroleum Co. vs. Vial,* 279 U.S. 95, at page 99,) or *if the very act * * * that incurred the tax * * * committed the goods to the carrier that was to take them across the sea, (A. G. Spaulding & Bros. vs. Edwards,* 262 U.S. 66, at page 69,) then the petitioner could very well rely on *Carson Petroleum Co. vs. Vial, Richfield Oil Co. vs. State Board of Equalization, A. G. Spaulding & Bros. vs. Edwards,* supra), but the facts as found by the Supreme Court of Michigan in the instant case are diametrically opposite those of the last cited cases.

In the instant case, the act of placing the gasoline in the hands of the carrier which was to take it abroad did not incur the tax as in the *Spaulding case* (supra) but on the contrary occasioned *the refund* of the tax assessed when the goods were placed in the ordinary domestic bulk plant of the petitioner.

Directly contrary to the facts in the *Richfield case* (supra), the gasoline in the instant case was not deposited in facilities built especially for export trade, and through which no

domestic operations were carried on, but was placed in facilities constructed for ordinary domestic trade and there commingled for the convenience and benefit of petitioner (440) with gasoline from which petitioner serviced its Michigan retail trade and a portion of the exportable gasoline being sold in the domestic retail trade. (440) (441)

In the instant case, the elements constituting the turning point of the *Carson Petroleum Co. vs. Vial,* (supra) are lacking—there *no oil was sold at St. Rose except what was exported. The only business conducted there was the unloading of the oil from tank cars into accumulating tanks and loading the oil from those tanks to tank steamers and the facilities were single purpose export facilities.* The court in *Carson Petroleum Co. vs. Vial,* 279 U.S. 95, at page 99, calls the tanks "storage tanks", but a review of the facts plainly shows that the tanks were not used for storage tanks in the true sense of the word, but were used only for the purpose of accumulating boat shipments. In the instant case the gasoline was deposited in tanks commingled with the purported export stock at the convenience of the foreign and domestic arms of petitioner's combine; some was sold in the Michigan retail trade; some was withdrawn for transshipment to Canada. (440; 441) In the *Carson Petroleum Co. v. Vial* case (supra) there were no complicated interlocking individual and corporate ownership and leasing arrangements conceived and carried on for the purpose of evading the payment of state taxes. (442)

Even if we accept petitioner's statement of facts, an ordinary reading would raise the question in the reader's mind: What is he asking this court to do? A close analysis, however, reveals that what he is actually asking this court to do is to set aside the determination of the lower court, wherein it holds that as far as is "reasonable possible" the

Secretary of State made refunds to the petitioner of the tax on all gasoline actually transshipped to Canada, and redetermine the involved factual situation which the petitioner alone brought about by its commingling of all of its gasoline, as the Michigan Supreme Court pointed out in its opinion as follows (440):

> "• • • Except that it was for the convenience and benefit of the plaintiff, by commingling the gasoline for transshipment with tax-liable gasoline, the tax-exempt gasoline would doubtless have been stored separately, and thus have avoided the confusion brought about by the manner in which the gasoline storage was handled."

From the last paragraph on page 7 of plaintiff's petition and his reference to the record on page 262, we find that petitioner expects this court to order the respondent arbitrarily to assume that there had been an evaporation loss of three percent (3%) of the total number of gallons during the time between original receipt of the gasoline and transshipment to Canada, and to give the petitioner credit for the actual number of gallons transshipped to Canada, plus three percent (3%) of that number. No doubt some evaporation occurred, but the exact amount of such evaporation could not be determined unless the gasoline to be exported were kept separate until the time of its transshipment to Canada. Certainly it could not have been determined while lying commingled with domestic stocks of gasoline (441) and while withdrawals from the commingled mass were being made from time to time to fill orders from the Michigan retail trade. (440)

Wherein was a Federal question of substance decided? Even if we should take the ridiculous position that the facts in the petitioner's case are parallel to the facts in the three

cases he relies upon, the opinion of the lower court specifically recognizes and follows the Export-Import Clauses of the United States Constitution. (440) The Michigan Gasoline Tax Act likewise recognizes these clauses. (Sec. 20 of Act No. 150, P. A. 1927, as amended, reads as follows: "Neither this act, nor any of its provisions, shall apply to foreign or interstate commerce".) The proper administrative officer of the state recognized it when refunds of tax were made. (440) The fact that this court might have made a different decision, as to the amount of gasoline unaccounted for than did the lower court, is immaterial. In *Jett Bros. Distilling Co. vs. City of Carrollton*, 252 U. S. 1, the court holds at page 6:

> "In order to give this court jurisdiction by writ of error under amended Sec. 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority upon a claim that it is repugnant to the Federal Constitution, treaties, or laws so as to require the state court to decide the question of validity in disposing of the contention. • • • "

This holding was specifically followed in *Warren W. Wilson vs. Otho A. Cook, Comm. of Rev.*, 327 U.S. 474, at page 482:

> " • • • 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis' of an appeal. *Jett Bros. Distilling Co. v. Carrollton*, 252 US 1, 6, 64 L ed 421, 423, 40 S Ct

255. It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, *Jett Bros. Distilling Co. v. Carrollton*, 252 US 1, • • • ".

In *Waters-Pierce Oil Co. vs. Texas*, 212 U.S. 86, at page 97 the court says:

"The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many aspects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to reexamine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the State.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby v. Boyd*, 128 U.S. 488; *Egan v. Hart*, 165 U.S. 188; *Dower v. Richards*, 151 U.S. 658; *Thayer v. Spratt*, 189 U.S. 346. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review

to questions of a Federal nature which we deem to be properly made in this record and essential to "the decision of the case."

In two of the cases relied upon by the petitioner, to-wit: *Richfield Oil Corporation vs. State Board of Equalization,* 329 U.S. 69, 91 L. Ed. 80; *A. G. Spaulding & Bros. vs. William H. Edwards, Collector of Internal Revenue,* 262 U.S. 67, 67 L. Ed. 865, the taxing statute itself was attached as being repugnant to the Export-Import Clauses of the Federal Constitution, and the question of the amount of tax under an admittedly constitutional statute, which is the real question in the case at bar, was not in issue.

In *Carson Petroleum Co. vs. Vial,* 279 U.S. 95, 73 L. Ed. 626, the question arose under a rather unique statute, (Act No. 170 of the Louisiana Public Acts of 1898), which assumed to tax all property of any nature, not previously exempted by law, on an ad valorem basis. The tax on the property involved was laid on an estimated average value for the taxable year. The difficulty of ascertaining the exact nature of the tax was avoided by reason of the fact that the parties had apparently agreed that the only question in the case was whether or not any tax at all could be collected, and that result would depend on whether or not the levy of the tax was an interference with interstate and foreign commerce.

Petitioner, on page 16 of its brief, argues for the application of the maxim "de minimis non curat lex" in the question of its commingling operations setting forth that the total gallonage involved is 1,975,402 and the tax complained of was laid upon a gallonage of only 60,000. It must be borne in mind that the 60,000 gallons do not represent the total amount of gallons commingled, but do represent mere-

ly the number of gallons which the petitioner could not account for when the state auditors were endeavoring to reconcile the confusion caused by petitioner's commingling operations. If the maximum "de minimis non curate lex" should control the decision of this court in this case, then the petitioner has "argued itself right out of court". There can be no question that if the maxim should be applied to a question which is controlling in the entire controversy, there are more, or at least, equally, compelling reasons for its application to the controversy as a whole. This being true, the respondent's purpose here has been accomplished, since that officer endeavors to show that this court is not concerned with the controversy in this cause and that the decision of the Michigan Supreme Court should be regarded as final.

Respondent is of the belief that it would be of no material assistance to this court to show in detail the manner in which the purported export shipments of gasoline were used to evade payment of the Michigan Gasoline Tax, and that it is sufficient to point out that the theory employed is the same as that set forth in the opinion of the lower court (443), from which it readily appears that the pivot point of the evasion scheme is to have on hand *at all times* a quantity of tax-exempt gasoline, out of which evaporation and handling losses in tax-paid gasoline may be recovered, and though it would be impossible to determine the exact point at which the unaccounted for gasoline was lost, it is safe assumption that most of the loss was occasioned by the replenishment of the depleted tax-paid domestic portion of the commingled stock from the purported tax-exempt foreign commerce shipments.

Petitioner does not clearly disclose in his brief exactly how he believes the respondent should have treated ship-

ments of gasoline consigned to Detroit under bills of lading bearing the legend "for export" but his real contention can be found between the lines; that contention being that so long as he sets up certain artificialities which would give the transaction the complexion of an export operation, it must be regarded as a sort of "sacred cow" and the state authorities must follow a strictly "hands off" policy with respect to it and, therefore, no showing of what became of the amount of gasoline actually received at petitioner's domestic plant could be required of it and petitioner could go merrily on replacing losses in his tax-paid domestic stocks from the tax-exempt export stocks without fear of detection. This was the real contention in many cases prior to *Monamotor Oil Company v. Johnson*, 292 U.S. 86, as well as in that case. There the principal question was whether or not an interstate commerce transaction was being taxed by the levy of a tax upon receipt of the goods and refund of the tax upon exportation of the same goods, and the court held that the commerce was not burdened and certainly the holding applies with equal force whether the commerce is interstate or foreign. So far as the questions involved in the instant case are concerned, the Iowa statute in the Monamotor case and the Michigan statute are nearly identical.

V

CONCLUSION

From the above we believe it clearly appears that a Federal question of substance is not involved here, but that in the event this court might hold that the facts do present such question, it was decided by the lower court completely in harmony with the decisions of this court, and the Petition for Certiorari should be denied.

Respectfully submitted,

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